No. 47181-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER J. ZACAPU, Appellant

v.

ANDRES ZACAPU-OLIVER, Respondent

REPLY BRIEF OF APPELLANT – JENNIFER J. ZACAPU

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STATEMENT OF AUTHORITIES

Washington Cases

Washington Statutes

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N/A

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N/A

I. REPLY ARGUMENT

1.1 Respondent's Reliance on Pre-Harmon v. DSHS, 134 Wn. 2d. 523 (1998) cases is misplaced.

The respondent has cited a number of cases for the proposition that he has a duty to support his stepchildren living in his home and that this duty is equal to that of his natural born children (Response Brief page 7).

For example, he has cited *State v Gillaspie*, 8 Wn. App. 560 (1973), for the proposition that the law treats "Stepchildren...with rights equal to those of natural children" (Response brief page 7). However, the *Gillaspie* case was a Division 1 case decided in 1973 before the legislature enacted changes to both *RCW 26.16.205* (1990) and *RCW 26.19* (1988). In 1998, the *Harmon* Court was asked to interpret the new statutes listed above, and the Court specifically stated "with the enactment of this state's child support schedule and standards in 1988, the legislature made a policy decision to impose the primary child support obligation on the child's natural parents..." *Id* at 526-527.

Likewise, the respondent's cases of *Groves v. DSHS*, 42 Wn. App. 84 (1985), and *Stahl v DSHS*, 43 Wn. App 401 (1986), are superseded by the legislative changes made in 1988 / 1990 as interpreted by the Court in *Harmon*. In both of these case, the Department of Social Health Services attempted to impose a child support obligation on step-fathers who had

separated from the wives for the support of their step-children. DSHS alleged that the RCW 26.16.205 imposed a duty of support on the step-fathers until the marriages were dissolved and both Courts of Appeal agreed.

This is a practice that was routinely taken by DSHS prior to the legislative changes made to RCW 26.19 (1988) and RCW 26.16.205 (1990) as evidenced by the mere publication of these two cases. However, as the prosecutor, Mr. Ford, stated to the Trial Court, "I haven't seen step-children be awarded a deviation in over 20 years. Hasn't been done. I remember doing pre Harmon... So I know; I've been here. I know what – when it did and when we stopped – we have not made a recommendation for step-children in years and years and years..." RP 23.

In fact, respondent has filed not a single supporting case in which the practice of deviating from the standard calculation under RCW 26.19.075 based upon a duty of support under the community property statute (RCW 26.16.205) has been sanctioned by a Court of Appeals or the Washington Supreme Court. In any event, the rulings in *Harmon* have made these prior cases inapplicable.

1.2 There is insufficient evidence to find the Respondent a De Facto Parent in Loco Parentis.

According to the respondent, a few months before the adjustment of child support was to be determined, he married a women with 6 children (May 7, 2014) and they moved into the house he was awarded in the dissolution action with appellant. CP 95-96. According to the respondent, the mere fact that 6 step-children have moved into his house is sufficient to establish a common law duty of support for him toward these 6 step-children under a theory of a defacto parent in loco parentis (Response Brief page 7-8).

However, the mere fact that the step-children are living in respondent's home does not create a defacto parent in loco parentis situation or a duty of support under RCW 26.26.205. In the case of *Montell v DSHS*, 54 Wn App 708 (1989), the Court of Appeals, Division 2 was faced with a case in which DSHS was attempting to impose a child support obligation on "custodial step-parent." In that case, the natural mother's two children lived with her and her new husband (James Montell) for a period of two years while the children's biological father was incarcerated. DSHS argued that James Montell was the custodial step-parent and therefore owed a duty of support to the children. The *Montell*

Court rejected this argument and held no in loco parentis relationship was established.

As the *Montell* Court stated "

> Under the common law rule, an "in loco parentis" relationship becomes established only when a stepparent intends to assume the status of parent. *State ex rel. Gilroy v King County*, 37 Wn 2d 926, 934, 226 P.2d 882 (1951); *Taylor*, 58 Wn. 2d at 512, 364 P.2d 444. The mere taking of a stepchild into the home does not establish such relationship unless the stepparent manifests an intent to assume the status of parent toward the child...The determination of whether an in loco parentis relationship is established, therefore, is a mixed question of law and fact, which turns primarily upon the factual determination of intent. *Montell* at 712. Emphasis Added.

In this case, the respondent has not provided any evidence as to his intent regarding the step-children. The Court does not have evidence if he intends to act as the defacto parent of these children, whether he provides guidance and supervision of the children, or whether he intends to adopt the children. Likewise, no evidence was supplied to the Court regarding the biological father's parenting of the children. Is the biological father exercising a shared residential schedule with the children? Is he providing guidance and supervision? We know that the biological father was providing financial support to the children as an order of child support had been entered and according to the State's records the biological had provided $33,044 since the 2008 order of child support was entered. RP 8-9. In short, there was no evidence provided to the Court to establish the

respondent's intent, so no in loco parentis relationship could be established.

1.3 The Trial Court's finding that the failure to deviate downward from the standard calculation of child support would leave respondent with insufficient funds to live on and that a deviation would still provide adequate resources for the child is not supported by the evidence.

In this case, it was undisputed that the mother's net income fell from $2,457.63 per month in 2012 to just $2,047 per month in 2014; a loss in the child's household of more than $410 per month. Furthermore, according to the mother's financial declaration incorporated into her declaration, this falling income resulted in insufficient funds in her household to provide for Dylen's basic needs.

Conversely, the father has sufficient income for his household. The undisputed facts demonstrated that the father's total resources available to his household was at least $5,311 per month in available resources, if not more. Incidentally, that does not include the resources he receives from renting out his garage and two camp trailers on his property. CP 116. That is $63,732 in undisputed after tax dollars to take care of his household needs and to pay his child support.

In fact, according to the respondent's own financial declaration this income is sufficient to allow him to pay for the following:

1) Total 401k Contributions - $443 p/m or $5,314 p/y CP 7
2) Clothes for Kids - $400 p/m or $4,800 p/y CP 108
3) Personal Expenses (clothes, gifts, etc...) - $330 p/m or $3,960 p/y CP 108
4) Meals Eaten Out - $300 p/m or $3,600 p/y CP 108

In other words, the father has enough income to contribute more than $5,000 to his 401(k), which is more than his current child support obligation ($350 x 12 = $4,200 in yearly child support). In fact, according to the respondent's financial declaration, he is spending more to cloth his step-children ($4,800 per year) then he is paying to support his own biological child.

Clearly, if the respondent has the ability to spend $17,674 a year on clothes, meals eaten out, voluntary 401(k) contributions, and personal expenses, he did not need a downward deviation in his child support obligation from $524 to $350 per month. Surely, the respondent had the ability to find the additional $174 per month from his discretionary expenditures to support his biological child.

VI. CONCLUSION

For the foregoing reasons, the Appellant asserts that the court erred when it provided for a downward deviation of the father's child support obligation when it held that the duty of support referred to in RCW 26.19.075(1)(e) includes the support obligation of a step-parent to step-children found in RCW 26.26.205. The court also erred when it compared

the financial resources of the parties and found a downward deviation of child support was necessary to prevent the obligor parent from having insufficient funds in his household over the support needs of the one child (Dylen) that was before the court. The appellant therefore request the court to reverse the trial court decision.

DATED this 19th day of August, 2015.

RESPECTFULLY SUBMITTED

Thomas A. Baldwin, Jr., WSBA #28167
Attorney for Appellant

DECLARATION OF SERVICE

I, Thomas A. Baldwin, Jr., declare under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct and based upon my own personal knowledge.

I certify that I caused one copy of the foregoing Brief of Appellant to be served on the following parties of record and/or interested parties by email delivery, to the below named parties as follows:

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Dated this 19th day August, 2015, at Puyallup, Washington.

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